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March 11, 2020

VIA EMAIL ONLY: HEATHER.MASON@DEP.STATE.FL.US**Heather Mason****Submerged Lands and Environmental Resources Coordinator****Florida Department of Environmental Protection****3900 Commonwealth Boulevard****Tallahassee, FL 32399-3000**

Re: Seminole Tribe of Florida's Comments on Florida Department of Environmental Protection Rule Development for Florida Administrative Code Rule 62-330, 62-331, and Draft State 404 Program Applicant's Handbook

Dear Ms. Mason:

This firm represents the Seminole Tribe of Florida (Seminole Tribe). The Seminole Tribe is a federally recognized tribe pursuant to Section 16 of the Indian Reorganization Act of 1934. The Seminole Tribe enjoys broad authority under the Clean Water Act; the Water Rights Compact Among the Seminole Tribe of Florida, the State of Florida, and the South Florida Water Management District; and the Tribal Water Code to protect Tribal waters. The Seminole Tribe has a significant interest in issues related to the State of Florida's (State/FDEP) application to seek assumption from the United States Environmental Protection Agency (EPA) of the Clean Water Act Section 404 Permitting Program (404 Program) and the associated rule development of Florida Administrative Code Rule 62-331 (Rule 62-331/Rule) and the State 404 Program Applicant's Handbook (404 Handbook). The Seminole Tribe remains concerned about the impending loss of federal tribal consultation rights for 404 permitting in Florida with the State's assumption of the 404 Program. The Seminole Tribe appreciates FDEP's efforts to work with the Seminole Tribe on opportunities for Tribal notice and consultation in the development of the State 404 permit process. The Seminole Tribe submits and reiterates the following Rule and 404 Handbook comments for FDEP's consideration, several of which were made in response to the May, 2018 version of the Rule and 404 Handbook and do not appear to have been included in the latest version of the Rule.

As an overall comment, the Seminole Tribe would like to maintain its consultation and commenting rights on State 404 permit actions in the same manner as currently followed for the existing U.S. Army Corps of Engineers (Corps) administered 404 Program.

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Tribal Liaison

The Corps and the South Florida Water Management District have established Tribal Liaisons to assist in coordination and communication on permitting actions with the Seminole Tribe. A designated "point person" within the Agencies has proven beneficial. We would recommend that FDEP also consider a Tribal Liaison for the State assumed 404 permit program.

Definition of Tribe and Tribal lands

The 404 Handbook defines Tribe to mean "any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a federal Indian reservation." The Seminole Tribe recommends ending the definition after "Secretary of the Interior." Additionally, the term "Tribal lands" is utilized within the Rule but does not appear to be defined in either the Rule or the 404 Handbook. The Seminole Tribe recommends adding a definition to the 404 Handbook defining "Tribal lands" to mean Indian country as that term is defined at 18 U.S.C. §1151. It is our understanding that defining Tribal lands as Indian country would be consistent with FDEP's proposed Memorandum of Agreement with EPA and the Corps.

Historic and Cultural Resources

It is our understanding that FDEP has been coordinating with the State Historic Preservation Office (SHPO) to determine how historic resources will be addressed in the Rule and 404 Handbook. The Seminole Tribe recommends that additional dialogue occur between FDEP, SHPO, and the Seminole Tribe to work out a Tribal consultation process for activities, covered by the Rule, which may impact Tribal historic resources. The Seminole Tribe's Tribal Historic Preservation Office (THPO) maintains a confidential database of sites (Seminole Site File) that are culturally sensitive to the Seminole Tribe, which the SHPO does not have access to. It is our concern that while the Rule provides an opportunity for SHPO to review activities for effects to cultural resources, there will be cases in which historic and cultural resources important to the Seminole Tribe are missed because THPO did not have the opportunity to review these activities and SHPO would not have knowledge of the sites. To that end, the Seminole Tribe would like to enter into an Intergovernmental Operating Agreement with FDEP and SHPO to set forth a process for coordination on the review of potential impacts from State 404 permitted activities to Tribal historic and cultural resources.

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Fish and Wildlife

It is also our understanding that FDEP is still in discussions with the United States Fish and Wildlife Service (USFWS) as to what process should be followed when threatened or endangered species could potentially be impacted by a proposed activity. The Seminole Tribe is concerned that there is no impact analysis being done for State issued 404 permits as to the direct, secondary and/or cumulative impacts on species and habitats, especially those that are adjacent to the Seminole Tribe's lands. This lack of analysis and resulting unmitigated impacts could place a disproportionate burden on the Seminole Tribe's lands for species habitat and conservation. Currently, these impacts are analyzed pursuant to the Endangered Species Act. Under the current Rule there would be no direct analysis unless an applicant voluntarily submitted to the Section 10 ESA process with the USFWS.

General Permits

As an overall comment, the Seminole Tribe would like to reiterate that all General Permit activities that are adjacent to or could impact Tribal Trust Resources be noticed to the Seminole Tribe. While Rule 62-331.200(3)(h) does provide requirement for notice of the use of General Permits within set mileage locations of Tribal Reservations and Reserved Rights lands before use; the Tribe wants to be sure that if there are General Permit activities that are outside these geographic areas but the activity could reasonable be foreseen to impact Tribal Trust Resources then those General Permits also be noticed to the Seminole Tribe. The Seminole Tribe also appreciates the addition of the Tribal Rights Condition at Rule 62-331.201(3)(j) making it clear that no General Permit activity may cause more than minimal adverse effects on tribal rights as described in the Rule. The addition of the reasonably foreseeable language above will assist in that protection.

The Seminole Tribe requests specific language within Section 5.2.6 of the 404 Handbook outlining the triggers for Tribal consultation on General Permits. The Seminole Tribe believes that the Seminole Tribe should be the entity to decide whether a project "is likely to have more than minimal adverse effect on tribal waters or resources," rather than FDEP or SHPO. At a minimum the Seminole Tribe would like to know what factors will be used in making this determination and who within the Agency will be responsible for making this decision.

The text of Section 62-331.200 Policy and Purpose of General Permits does not clearly direct an applicant to coordinate with the SHPO and THPO on General Permits. While Section 5.2.2 of the 404 Handbook explains that all General Permits require coordination with SHPO, this requirement should be made more explicit in the text of the rule and THPO should be included. The Seminole Tribe requests a new subparagraph be added in Section 62-331.200(3) to provide

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notice to the potential General Permit applicant mirroring the requirements of subparagraph (j) as to SHPO, but speaks to the opportunity for applicants to contact THPO for a determination of whether the project area includes a tribal cultural and/or historic resource listed in the Seminole Site File. Within the 404 Handbook at Section 5.2.6, the Seminole Tribe also requests language that states that "If use of a general permit requires notice to the Agency, the Agency shall forward a copy of the notice to the THPO for review."

Rule 62-331 and the 404 Handbook do not provide notice to and an opportunity for comment by the Seminole Tribe for General Permits comparable to what currently exists for the Corps' Nationwide Permits issued in Florida. The Seminole Tribe requests FDEP include the following Tribal Regional Conditions into Rule 62-331 for General Permits:

- The Corps' places conditions on all Nationwide Permits related to the discovery of previously unknown remains and artifacts. This condition requires that the permittee contact the Agency within the same business day and the Agency contacts SHPO, and the appropriate THPO, to assess the significance of the discovery and devise appropriate actions. Only Section 62-331.248 – "General Permit for Florida Department of Transportation and Florida's Turnpike Enterprise" appear to contain this Tribal Regional Condition. The Seminole Tribe requests that the Tribal Regional Condition related to the discovery of previously unknown remains and artifacts apply to all General Permits authorized by FDEP in Section 62-331.201(3).
- Nationwide Permit 43 - "Stormwater Management Facilities" requires written approval from the Seminole Tribe on projects adjacent to Tribal lands. The Seminole Tribe requests that Section 62-331.240 – "General Permit for Stormwater Management Facilities" also be updated to reflect the same requirement.

Secondary and Cumulative Impacts Analysis

The Clean Water Act's 404(b)(1) regulations require that an applicant demonstrate a secondary and cumulative impacts analysis has been done prior to issuance of a 404 permit. Although not entirely clear from the current draft Rule, it appears that FDEP is attempting to address the 404 secondary and cumulative impacts analysis by reference to the existing Environmental Resource Permitting (ERP) criteria in Rule 62-330 and the Applicant's Handbook Volume I at Sections 10.2.7 and 10.2.8. First, the Volume I Secondary and Cumulative Impact sections do not meet the requirements of the Clean Water Act's 404(b)(1) Guidelines for the secondary and cumulative impacts analysis. See *40 CFR 230.11*. Therefore, the factual determinations required for a secondary and cumulative impact analysis should be explicitly set

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forth in the 404 Handbook and a direct reference to the need for a secondary and cumulative impacts analysis should be made in the text of Rule 62-331.

Second, if the intent is for the ERP secondary and cumulative impact criteria to be used in lieu of the Clean Water Act 404 criteria, which we do not recommend, then that needs to be more clearly stated in the Rule for applicants. For example, the term cumulative does not appear in the requirements of Rule 62-331 for Individual Permits. The secondary and cumulative impacts analysis only appears within the 404 Handbook through cross-references in the 404 Handbook to the entire Volume I without specifying the key sections on secondary and cumulative impacts. At a minimum, the Seminole Tribe recommends incorporating language into the Rule that clarifies that Individual Permits will be reviewed against Volume I in Sections 62-331.050(2)(c). Additionally, the Seminole Tribe recommends reference to Volume I be added to the list of Conditions for Issuance in Section 62-331.053. However, the more detailed secondary and cumulative impact requirements found in Section 230.11 of the 404(b)(1) Guidelines should be incorporated into the 404 Handbook and referenced in the Rule to ensure the State's 404 Rule satisfactorily incorporates the requirements of the federal 404 law.

Emergency Field Authorizations

The Seminole Tribe requests to be added to the list of agencies for consultation regarding the issuance of emergency permits at Section 62-331.110(7).

Thank you for the opportunity to provide comment on FDEP's Proposed Rule 62-331, F.A.C. and the Section 404 Handbook. We look forward to further discussions with FDEP on Section 404 Assumption. Please do not hesitate to contact us if you have any questions regarding the foregoing.

Yours sincerely,



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